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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHABAD,

and *Petitioner,*

COUNTY OF ALLEGHENY and CITY OF PITTSBURGH,

v.

AMERICAN CIVIL LIBERTIES UNION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR PETITIONER CHABAD

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QUESTIONS PRESENTED

1. Whether the Establishment Clause prevents a municipality from permitting the placement, at no taxpayer expense, of a Jewish symbol adjacent to a Christmas tree more than twice its size as part of the municipality's seasonal display.

2. Whether a municipality that erects a seasonal Christian display is required, by the Establishment Clause's prohibition against denominational preferences, to permit inclusion of a privately funded Jewish symbol.

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BRIEF FOR PETITIONER CHABAD

OPINIONS BELOW

The decision of the court of appeals is reported at 842 F.2d 655. The rulings of the district court are unreported.

JURISDICTION

The decision of the court of appeals was filed on March 15, 1988, and timely petitions for rehearing were denied on April 19, 1988. The petition for a writ of certiorari in No. 88-90 was filed on July 15, 1988, and was granted on October 3, 1988. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATEMENT

1. *Introduction*

The federal government, all state governments, and thousands of municipalities throughout the United States mark the Christmas season each year with holiday displays on government property that ordinarily include Christmas trees, wreaths, lights, and other decorations.[1] The time of the year selected for these displays coincides with one of the most sacred religious holidays of the Christian calendar. The most important festivals of the Jewish year occur at other times—*i.e.*, in late September and early October (Rosh Hashanah, Yom Kippur, and Sukkot) and in April (Passover). There are no governmental displays for these Jewish holidays. But because the Jewish festival of Chanukah is also celebrated in December, some governmental agencies add a mark of respect for Americans of the Jewish faith to the symbols displayed publicly during the Christmas holiday season. The Jewish component is a *menorah*, or candelabrum, that can be used for the lights that are part of the Chanukah celebration. The constitutional issue in this case is whether the display on public property of this Jewish symbol, at a time when displays are primarily prompted by Christian tradition, violates the First Amendment's Establishment Clause.

2. *The Display*

The City of Pittsburgh has displayed a Christmas tree on the steps of its City-County Building for many years. Since at least 1979-1980—and possibly earlier—the City has placed a nine-branched candelabrum or "menorah"

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[1] This Court described Christmas displays "found in hundreds of towns or cities across the Nation" in the opening section of its opinion in *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984).

adjacent to its Christmas tree (J.A. 221-22).[2] In 1987, the City's display contained a 45-foot-high Christmas tree bearing lights and other ornaments, with an adjacent 18-foot-high menorah (J.A. 206-07). The tree stood on a platform that was 20 feet square and bore a sign reading:

> SALUTE TO LIBERTY
>
> DURING THIS HOLIDAY SEASON, THE CITY OF PITTSBURGH SALUTES LIBERTY. LET THESE FESTIVE LIGHTS REMIND US THAT WE ARE THE KEEPERS OF THE FLAME OF LIBERTY AND OUR LEGACY OF FREEDOM.
>
> RICHARD S. CALIGUIRI, MAYOR

The menorah is owned by Chabad and has been loaned to Pittsburgh, free of charge, for inclusion in the seasonal display (J.A. 290). The entire display, including the tree, its ornaments, the platform, the sign, and the menorah, is put in place each year by city employees. The usual procedure is that the platform is constructed first and the Christmas tree is placed on the platform several days thereafter. The "lifter" used for the tree is also used, at the same time, to move the menorah to its proper location. It takes approximately one hour to put up the menorah. The menorah is removed when the remainder of the display is removed. It is stored between seasons on city property (J.A. 219-24). The district court found that the added expense to the city of displaying the menorah is minimal (Pet. App. III, 39a).

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[2] The nativity scene that is in controversy between the plaintiffs and Allegheny County is located in the Allegheny County Courthouse, which is one block away from Pittsburgh's City-County Building. It has nothing to do with the menorah's display apart from the fact that the plaintiffs chose to institute legal action jointly against both displays.

3. *The Menorah*

At issue is a candelabrum that, according to the testimony of experts introduced in the district court, has a cultural, universal and religious significance. It is used as part of the Jewish festival of Chanukah, which is an eight-day holiday celebrating the Jewish people's victory for religious and political freedom over the Seleucid Empire approximately 2,150 years ago (J.A. 138, 229). Following the victory, the Jewish community found enough pure oil to burn in the Temple's seven-branched candelabrum for only one day. The Talmud describes that the oil burned, instead, for eight days. On this account, Chanukah lights are lit each evening for eight consecutive nights, with an increasing number of candles each successive night. The Chanukah candelabrum has eight branches, with a ninth or "service" branch in the center (J.A. 139).

A menorah is used in Jewish homes for the ceremony of lighting Chanukah candles. The menorah itself has no inherent religious significance (J.A. 237-39, 309-10). It is not a holy object. It can be made from bottle caps or pieces of tin (J.A. 238). It may be discarded after being used and, at other times of the year, may be used for non-religious purposes such as to light a room (J.A. 238, 240). By contrast, Jewish ritual law prescribes what may be done with inherently religious objects. For instance, a Torah scroll, which is a handwritten parchment containing the Five Books of Moses, must be buried in a special manner when it is no longer usable. Many other rules pertain to its usage in deference to its sanctity (J.A. 237).

Rabbi Yisroel Rosenfeld, Chabad's expert, testified that there are many objects which remind one of a religious event but are not intrinsically sacred (J.A. 240-43). A symbol used during Chanukah is a "dreidle"—a top bearing Hebrew letters used in a Chanukah game. The Hebrew letters on a dreidle stand for the words "a great miracle happened there" (J.A. 241-42). Potato pancakes are also eaten on Chanukah since they are fried in oil and remind observers of the miracle of the oil in the Temple. Neither the top nor the pancake is a sacred object (J.A. 242-43).

In addition to conveying an historical message regarding the above events, the menorah is a political symbol. Secular Jewish groups frequently use a menorah as a symbol (J.A. 310). The State of Israel uses a seven-branched menorah as a symbol (J.A. 310).

4. *The District Court's Decision*

The district court denied the plaintiffs' request for injunctive relief which sought to bar the City of Pittsburgh from displaying the menorah as part of its seasonal display. After a hearing on plaintiffs' motion for a preliminary injunction, the district court held that "the displays here both of the nativity scene presently in place and the proposed placing of the menorah are de minimis in the context of the application of the Establishment Clause" (J.A. 9). After permitting Chabad to intervene, the district court conducted a hearing during which testimony was provided regarding the use of the menorah (J.A. 211-318). Following that hearing, the district court entered judgment for the defendants. Insofar as the court's opinion involved the menorah, the court stated that the expense to the city in displaying the menorah was "minimal and of no consequence" (Pet. App. III, 39a), that the menorah "has no particular religious significance when placed in a public location beyond signifying a 'Light to the World' somewhat like the Christmas message 'Peace on Earth, Goodwill to Men'" (Pet. App. III, 39a), and that there was no evidence that the city was motivated by religious purposes (Pet. App. III, 40a).

5. *The Court of Appeals' Decision*

By a 2-to-1 vote, the court of appeals reversed. Applying the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the majority held that the second prong of the *Lemon* test is violated by the display of the menorah on the steps of the City-County Building. The majority said that "the only reasonable conclusion is that by permitting the creche and the menorah to be placed at the buildings the city and county have tacitly endorsed Christianity and Judaism and have therefore acted to advance religion." 842 F.2d at 662. Petitions for rehearing *in banc* were denied by a 7-to-5 vote.

INTRODUCTION AND SUMMARY OF ARGUMENT

The City of Pittsburgh long maintained a seasonal city display that expressed only the message of a Christian holiday—Christmas. Beginning approximately eight years ago, the city permitted a Jewish group to add to the city display a separate symbol that brings to mind, among other concepts, the Jewish holiday of Chanukah, celebrated at the same time of year as Christmas. This modification of the city's seasonal display has now been found unconstitutional on the ground that the added symbol (and *only* the added symbol) is a tacit endorsement of Judaism that "advances" religion and thereby violates the Establishment Clause. When considered in its full context, the added symbol—the menorah—does not constitute official "religious endorsement" at all. Indeed, the menorah's principal effect is to mitigate the appearance of one-sided official endorsement conveyed by a large Christmas tree on the steps of the city's central public building. Rather than endorsing a single faith, a menorah placed adjacent to a Christmas tree tells Pittsburgh's residents that the city is neutral on questions of religion—that all faiths may be represented in a city-maintained seasonal display.

The challenge to the menorah turns the principle of religious liberty upside down. Pittsburgh should be applauded for erecting a holiday display that demonstrates the religious diversity of this country. Instead, it is attacked by groups that shortsightedly view a single component of the city's display as official approval of a particular religion.

In fact, Pittsburgh's display is patently constitutional under the expressed views of both the majority and the dissent in *Lynch v. Donnelly*, 465 U.S. 668 (1984). The majority's reasons for permitting the display that was at issue in *Lynch* apply fully to this case. The secular purpose of Pittsburgh's display is expressed in the sign that stands before the Christmas tree. The "primary effect" of placing a menorah next to a Christmas tree is surely not to endorse the faith symbolized by the menorah. Rather, it represents openness and even-handedness. And there is no reason whatever for Pittsburgh's officials and any religious functionaries to have any administrative entanglement in the erection or removal of the display.

The *Lynch* dissenters should, we believe, also approve of the display of the menorah. When the symbol of a minority faith is displayed, there is no real danger that it will be taken as an alignment of government with that faith. That is particularly true if, as happened here, the minority's symbol stands side-by-side with a symbol that has religious meaning only to Christians. That combination is only an endorsement of religious even-handedness and total religious toleration.

Moreover, the menorah is not a religious symbol that is as significant to Judaism as a creche is to Christianity. A creche depicts an event that is at the heart of Christian theology. A menorah plays a substantially different role in Judaism. It is not a sacred or devotional object of worship, and it is not intrinsically holy. It is a national and cultural symbol for Jewish people, as well as a token of a particular holiday and religious observance. Indeed, it symbolizes various universal qualities that ex-

tend beyond the Jewish religion and the Jewish people. It is, in every practical sense, the analog of a Christmas tree, and its status under the Establishment Clause should be no different than that of a Christmas tree.

We note, moreover, that constitutional principles *compel* the City of Pittsburgh to grant Chabad the right to display the menorah. *Larson v. Valente*, 456 U.S. 228 (1982), prohibits denominational preferences. And if Christianity may be represented by a Christmas tree on the steps of the City-County Building, Pittsburgh must grant equal access, on request, to the symbols of other faiths. That result is required not merely by the Religion Clauses of the First Amendment, but also by its protection for freedom of expression.

ARGUMENT

I. PITTSBURGH'S DISPLAY OF THE MENORAH IS CLEARLY CONSTITUTIONAL UNDER THIS COURT'S DECISION IN *LYNCH v. DONNELLY*.

The dissenting judge in the court below accurately observed that this Court's decision in *Lynch v. Donnelly*, 465 U.S. 668 (1984), "directly addresses and conclusively resolves the dispute we encounter here." 842 F.2d at 666. The majority opinion acknowledged that "the starting point of our analysis should be *Lynch v. Donnelly*" (842 F.2d at 659), but it concluded that the *Lynch* decision did not control this case. We believe, for reasons elaborated at pp. 21-27, *infra*, that Pittsburgh's display of the menorah is constitutional even under the reasoning of the dissenting opinion in *Lynch*. But it is abundantly clear that the *Lynch* majority's views, as expressed in the Court's opinion by then Chief Justice Burger, require reversal of the decision below.

A. The Display Satisfies the Constitutional Standards Applied in the Majority Opinion in *Lynch v. Donnelly*.

Lynch involved, as does this case, the constitutionality of a municipality's public display erected during the Christmas season. This Court rejected an Establishment Clause challenge to the inclusion of a nativity scene in that display, although the Court acknowledged that the nativity scene was a Christian religious symbol.[3] The Court concluded that eliminating the creche from the city's Christmas display "would be a stilted overreaction contrary to our history and to our holdings" and that to view the creche as posing "a real danger of establishment of a state church" would be "far-fetched indeed." 465 U.S. at 686. These conclusions, as well as the reasons that underlie them, apply fully to the menorah display in this case.[4]

The *Lynch* Court analyzed the public display that was challenged in that case by the three-part standard applied in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). If the *Lemon* criteria, as explained in *Lynch* and applied most recently in *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988), are applied, Pittsburgh's menorah plainly withstands constitutional attack.

1. *Display of the menorah serves a secular purpose.*— The *Lynch* Court treated the nativity scene as a religious one, but it rejected the argument that the creche's religious nature required its exclusion from the city's Christmas display. The Court observed that the creche could

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[3] The penultimate sentence of the opinion, which summarized the Court's decision, stated: "We hold that, *notwithstanding the religious significance of the creche*, the city of Pawtucket has not violated the Establishment Clause of the First Amendment." 465 U.S. at 687 (emphasis added).

[4] Since the creche displayed in the Allegheny County building is not involved in the controversy between Chabad and the plaintiffs, we do not discuss, in this brief, the constitutionality of that display.

not be viewed in isolation, but had to be evaluated in the context of the holiday season and the entire display. The Court said (465 U.S. at 681):

> The display is sponsored by the city to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes.

By the same reasoning, Pittsburgh's combined display of a Christmas tree and a menorah is designed "to celebrate" the Christmas and Jewish holidays of the particular season. Indeed, under the reasoning of *Lynch*, even if the menorah stood alone, its presence would merely "celebrate" the Jewish holiday and remind one of its origins, just as the creche did in *Lynch v. Donnelly*.

Moreover, the *Lynch* Court further defined the first of the three "prongs" of the *Lemon v. Kurtzman* test when it noted that "there is insufficient evidence to establish that the inclusion of the creche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message." 465 U.S. at 680. The same can surely be said of Pittsburgh's menorah. By no stretch of the imagination can it be deemed "a purposeful or surreptitious effort" to manifest "subtle governmental advocacy of a particular religious message." As we demonstrate later in this brief (pp. 24-26, *infra*), the menorah conveys far less of a "religious message" than a nativity scene. And its display in immediate juxtaposition with a Christmas tree surely refutes any suggestion that the government is intending to advocate a "particular" faith or religious practice or attempting to establish Judaism as the city's religion.

In this case, unlike *Lynch*, the trial judge, who heard the evidence, concluded that the menorah "was but an insignificant part of another holiday display" and that the display (along with that of Allegheny County) "had a secular purpose, [and] their purpose was not to advance or prohibit religion" (Pet. App. III, 40a). Indeed, even the court of appeals explicitly disclaimed any finding that there was a forbidden religious purpose behind the display of the menorah. 842 F.2d at 663.

The "purpose" of the joint display of the tree and the menorah was clearly expressed in the large sign that stood beneath the tree. It described the total scene as a "Salute to Liberty" and emphasized the message of the "festive lights"—*i.e.*, "that we are the keepers of the flame of liberty and our legacy of freedom." This was an overwhelmingly secular message.

In the courts below, the plaintiffs and an *amicus* argued that the dominant purpose of displaying a religious symbol *must* be to convey a religious message.[5] The Court in *Lynch* squarely rejected that argument, and it should be rejected here as well. If any message concerning religion was conveyed by display of the menorah, it was the message of religious liberty—reminding the citizenry of Pittsburgh that the United States welcomes the practice of all faiths, and that no one becomes a second-

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[5] This is not a case in which a religious ceremony is being performed on public property. The only issue in this case is whether the menorah may be *displayed*. There is some fragmentary testimony in the record to suggest that the menorah has, at times, been lit in a public ceremony. Whether the lighting is a religious observance of any kind, as well as how the lighting is carried out, are subjects that range far beyond the record made in the district court. The relief sought by the plaintiffs was not an injunction against lighting the menorah or against reciting any blessings in connection with its lighting. The requested relief was total removal of the menorah, and that is the relief that the court of appeals granted. Hence, it is that relief that must be judged in this Court. And, we submit, there is no basis in the Establishment Clause for prohibiting *display* of the menorah. Whether and to what extent the Establishment Clause might prohibit the recitation of blessings upon lighting a menorah that is displayed in a central public forum is a markedly different question than the one that was litigated below and is reviewed here on certiorari.

class citizen in this country because of his religious beliefs.

2. *The "primary effect" of the menorah's display is not to advance or benefit religion.*—In considering the second "prong" of the *Lemon* test, the *Lynch* Court first compared the quantum of assistance derived from a publicly financed creche with the various forms of financial aid to religious institutions that this Court had previously upheld against constitutional challenge. 465 U.S. at 681-82. That same comparison requires similar rejection here of the assertion that the "primary effect" of the menorah display is to benefit the Jewish faith. Display of a menorah is surely less beneficial to the Jewish religion than the loan of secular textbooks to Jewish religious schools, or the transportation of students to such schools, or federal grants for colleges that combine secular and Jewish religious education, or the exemption of synagogues and religious schools from local property taxes. This Court's decisions permitting such "benefits and endorsements" against claims that their "primary effect" is to aid religion require *a fortiori* rejection of a similar challenge based on the "primary effect" of a governmentally displayed menorah.

The *Lynch* Court also dealt with the principal ground on which the majority of the court of appeals relied in this case. The court below ruled that display of the menorah (and the creche in Allegheny County's building) violated the second "prong" of the *Lemon* standard because "the only reasonable conclusion is that by permitting the creche and the menorah to be placed at the buildings the city and county have tacitly endorsed Christianity and Judaism and have therefore acted to advance religion." 842 F.2d at 662. This same argument—*i.e.*, that the display of a religious symbol will be viewed as a governmental endorsement of the symbol's religion—was discussed and rejected in *Lynch*. The *Lynch* majority referred explicitly to the fact that "some observers may

perceive that the city has aligned itself with the Christian faith by including a Christian symbol in its display and that this serves to advance religion." 465 U.S. at 683. The *Lynch* Court held that this perception was only an "indirect, remote, and incidental" benefit to religion—no greater advancement of religion than legislative or executive proclamations recognizing the origins of the religious holiday.

To be sure, the *Lynch* case concerned a nativity scene on *private* property in the heart of town, and the present case concerns a display on *public* property. But the *Lynch* Court did not emphasize or, indeed, even mention the ownership of the site where the creche stood when it rejected the claim that its "primary effect" was to endorse a particular religious belief. Who held title to the land was plainly irrelevant to the decision in *Lynch*. The Court assumed there, as it may assume here, that because of the centrality of its location observers would view the display as governmentally sanctioned in one form or another. Nonetheless, the indirect, remote and incidental benefit to religion from the appearance of governmental endorsement was not great enough to affect the constitutionality of the display in *Lynch* and it should not affect the constitutional question here.

Moreover, the display in *Lynch* was *more* pervasively official than Pittsburgh's menorah display because the *Lynch* display had been purchased by the city and was, in fact, owned by the municipal government. In the present case, the menorah is owned by Chabad. It is loaned to the City of Pittsburgh for its use, and the city has spent no taxpayer funds to purchase or refurbish it.

Finally, in considering the "primary effect" of the display in this case, the Court cannot ignore the fact that, unlike the display in *Lynch*, Pittsburgh's display includes symbols of more than one religion. If the inclusion of an overwhelmingly Christian scene in an exclusively Chris-

tian holiday display only advanced religion indirectly, remotely and incidentally—as the *Lynch* Court held—the display of Jewish and Christian symbols side-by-side surely does not benefit or advance either religion in a constitutionally impermissible manner.

3. *Display of the menorah does not excessively entangle the city with religion.*—The *Lynch* Court found that the third criterion of the *Lemon* test did not justify a finding of unconstitutionality because there was no evidence of contact between government and the church on the content or design of the exhibit and no ongoing day-to-day interaction. 465 U.S. at 684. The same is true here. Although the court of appeals in this case did not discuss the "entanglement" aspect of the *Lemon v. Kurtzman* test, there is, in fact, no basis for claiming that there is any "entanglement" whatever. The evidence establishes that the City of Pittsburgh erects the display, including the menorah, on its own, removes it on its own, stores it by itself, and has no occasion to consult with Chabad on "content or design" or on any other aspect of the display (J.A. 224).[6]

Nor can it even be argued that there is "political divisiveness" of the sort that has occasionally been discussed in judicial opinions on the Establishment Clause. Since no governmental subsidies are involved, there is no possibility, much less likelihood, of political pressure to increase benefits for one faith at the cost of another, or to benefit religion generally at the expense of atheists or others who are non-religious. Consequently, display of the menorah plainly passes the third "prong" of the *Lemon v. Kurtzman* test.

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[6] It was suggested in the court below that the city must consult Chabad to learn the dates of Chanukah. In fact, the testimony establishes that the menorah is erected when the Christmas tree is erected, irrespective of the precise dates of Chanukah (J.A. 220). Moreover, the dates of Chanukah each year appear on most secular calendars. They are not a secret known only to Chabad.

B. The Display Satisfies the Standards of Justice O'Connor's Concurrence in *Lynch v. Donnelly*.

In her separate opinion, Justice O'Connor emphasized the first two "prongs" of the *Lemon* standard, laying to one side the subject of "political divisiveness" which, she said, "should not be an independent test of constitutionality." 465 U.S. at 689. Following her approach in *Lynch*, it is clear beyond a shadow of doubt that Pittsburgh's menorah display is constitutional.

1. *Pittsburgh did not intend to endorse Judaism.*—It is even more plain in this record than it was in *Lynch* that the city had no actual intention of communicating endorsement or disapproval of a particular religion by its display. The overriding purpose of including a menorah was to balance the holiday display—to demonstrate to religious minorities, such as Pittsburgh's Jewish residents—that the city's display of a Christmas tree was not intended to endorse Christianity or to demean non-Christians. Indeed, a Jewish county employee who is an individual plaintiff testified that this was his understanding of the city's motive in displaying the menorah (J.A. 127-28).[7] In this case, as in *Lynch*, the menorah cannot be separated from the full display. An observer sees the Christmas tree with its adjacent menorah, and the city's evident and apparent purpose must be determined from that over-all perspective.

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[7] Howard Elbling testified as follows:

Q. What is your reaction to the display of the Menora?

A. Well, it's, I have a mixed reaction to that one. In one respect I'm proud as a Jewish person that the symbol of my religion is displayed. However, I get the impression by the placement of that Menora next to a Christmas tree of similar size that they are mainly to appease Jewish people, and I'm offended by the fact that people are trying to equate Christmas and Hanukkah. The holidays have nothing to do with each other, they merely happen to fall in approximately the same period of time.

2. *The full display does not communicate government endorsement or disapproval of any religion.*—The factors that led Justice O'Connor to conclude that the creche at issue in the *Lynch* case did not communicate a governmental endorsement of Christianity apply, with even greater force, to the display of the menorah adjacent to a Christmas tree. In the context of Pittsburgh's display, the menorah celebrates the Jewish holiday of Chanukah in an extremely common form and in a manner that is understood by all reasonable people not to be an endorsement. During the December holiday season, the words "Happy Chanukah" frequently accompany "Merry Christmas" in public displays in order to demonstrate religious diversity and impartiality. By the same token, the symbol of the menorah is commonly displayed together with the symbol of the Christmas tree to show that no particular religion is favored or endorsed.

If, as Justice O'Connor concluded, the nativity scene in *Lynch* was merely a public "acknowledgment" of religion and could not be seen as an endorsement of Christianity (465 U.S. at 692-93), the display of the menorah in this case is surely no more than an acknowledgment. As we note at pp. 24-26, *infra*, the menorah is less sectarian and central to its faith than a creche is to Christianity; the menorah symbolizes national and cultural ideals as well as a religious observance. And when it appears immediately adjacent to a symbol that is identified with a Christian holiday and whose message is meaningful only to Christians, the menorah can hardly be viewed by any reasonable person as a governmental endorsement of Judaism.

C. The Display Affirmatively Implements the Values of the Religion Clauses of the First Amendment.

The relief sought here by the plaintiffs—led by a national organization whose overriding goal is to preserve civil liberties—singularly undermines the values of the

First Amendment. If the mandate of the court below were ever carried out, Pittsburgh would be officially recognizing only the Christian faith and only Christianity's important religious holidays. The 45-foot-high Christmas tree standing alone on the steps of Pittsburgh's City-County Building would convey to members of minority faiths the message that they are aliens in American society. Those who cannot identify with the religious theme of the Christmas tree and its lights would necessarily feel excluded in their own city.

By adding a menorah to its seasonal display, Pittsburgh promotes the values of religious pluralism that are the foundation of the first sixteen words of the First Amendment. The majority opinion in the *Lynch* case discussed, at some length, the "contemporaneous understanding" of the First Amendment's Establishment Clause and the role of religion in American public life. 465 U.S. at 673-78. It is clear from that history that expressions of religious belief have been encouraged in this country, and that our Constitution's philosophy is an "accommodation of all faiths and all forms of religious expression, and hostility toward none." 465 U.S. at 677. James Madison said in Federalist No. 51 that security for religious rights depends on "the multiplicity of sects." Our nation is proud of its "pluralistic society." 465 U.S. at 680. Freedom for all religions is part of our national heritage and is suitably saluted by Pittsburgh's display.

When the Christmas tree and the Chanukah menorah stand side-by-side, the message for most onlookers is one of total freedom and full religious toleration. No reasonable observer would feel coerced by the simultaneous expression of respect for two of mankind's greatest faiths. The removal of the menorah, sought short-sightedly by groups that claim to be advancing civil liberties, converts a message of freedom into a banner of exclusivity.

D. The Decisions of Lower Federal Courts After *Lynch* Do Not Warrant Any Different Result.

A number of federal appellate rulings since *Lynch* were read by the court below as justifying its conclusions. Even if those rulings were approved by this Court—a hypothesis that is not free of doubt—they would not sustain the decision of the court of appeals.

Two cases on which the court of appeals relied heavily —*American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561 (6th Cir.), *cert. denied*, 479 U.S. 939 (1986), and *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987)—found that the first prong of the *Lemon* standard—the "secular purpose" test—was satisfied. In *Birmingham*, it was sufficient that a publicly financed creche on the lawn of Birmingham City Hall was intended "to be in keeping with the expression of the total community toward" the Christmas period. 791 F.2d at 1565. The Sixth Circuit said that this justification refuted any claim that the actual purpose of the creche was to endorse religion.

By the same token, the majority in the *Chicago* case concluded that it was permissible, under the first component of the *Lemon* test, to "take official note of Christmas" by accommodating the religious sentiments of the city's Christian residents. The Court said that such responsive recognition "is not the same as intending to promote a particular point of view in religious matters." 827 F.2d at 127. The holdings in *Birmingham* and *Chicago*—as well as the parallel conclusion of the *Lynch* majority—compel the same result here.

In both *Birmingham* and *Chicago*, the Court majorities concluded that creches were unconstitutional under the second, or "primary effect," component of the *Lemon v. Kurtzman* standard. In each instance, a nativity scene stood by itself. The solitariness and high degree of religiosity of that display gave the impression of governmental endorsement of its religious message.

Pittsburgh's menorah does not stand alone. Looming over it is a Christmas tree. Plainly, Pittsburgh does not convey a message of endorsement for Judaism by this display.

Indeed, in the *Birmingham* case, the Court took note of the obvious fact that the creche represents the faith of the majority—Christianity. In this light, the Court concluded: "It is difficult to believe that the city's practice of displaying an unadorned creche on the city hall lawn would not convey to a non-Christian a message that the city endorses Christianity." 791 F.2d at 1566. And the Court in *Chicago* also held that the self-contained nativity scene in Chicago's City Hall "unavoidably fostered the inappropriate identification of the City of Chicago with Christianity." 827 F.2d at 128. Similar conclusions cannot be drawn on the facts of this case. This record parallels that of *Lynch* because the symbol that is challenged—the menorah—is only part of a larger display on the steps of the City-County Building.

Moreover, the menorah is, for reasons stated hereafter (pp. 24-26, *infra*), less of a religious symbol than others that have run afoul of the "primary effect" test. Precedents establish that the religious significance of a publicly displayed object is critical in determining whether the display has a primary or principal effect of advancing religion. For example, in *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986), a prominent display of a lighted Latin cross during the Christmas season was held to be impermissible. The Seventh Circuit held that the cross is the "principal symbol" of the Christian faith, and not of a particular holiday (as is a creche). 794 F.2d at 271, 273. Because of the "highly prominent place" of that symbol in an isolated display, the Court determined that the Establishment Clause had been violated. The present situation involving a symbol with

less religious significance in an overall seasonal display, is far removed from that of *St. Charles.*[8]

A comparison of the scene on the steps of Pittsburgh's City-County Building with the symbol that the Tenth Circuit found to violate the Establishment Clause in *Friedman v. Board of County Commissioners of Bernalillo County*, 781 F.2d 777, 783 (10th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986), makes the point. Whereas approximately half of the Bernalillo County seal consisted of a Latin cross enclosed in a "blaze of golden light," with other objects, such as sheep, confirming the identification with the Catholic faith, the overall impression of the display on the steps of the City-County Building is not an endorsement of a particular religious faith. The Bernalillo County seal conveyed "a strong impression to the average observer that Christianity is being endorsed" (781 F.2d at 782), and it led "the average observer to the conclusion that the county government was 'advertising' the Catholic faith" (781 F.2d at 781). No "endorsement" or "advertisement" of any particular faith could possibly be assumed by the "average observer" who sees the seasonal display of Christian and Jewish symbols displayed by Pittsburgh.

[8] The menorah's lesser degree of religious significance was admitted by the B'nai B'rith Anti-Defamation League, counsel for one of the plaintiffs, in its brief in the court of appeals. That brief stated (p. 18):

> Last, the Menorah does not have the same effect of advancing religion as the Nativity scene . . . . Moreover, while the Menorah commemorates a miracle in Jewish history, it does not have the centrality in the Jewish religion that the Nativity scene, which symbolizes the Messiah, has for Christianity.

II. THE REASONING OF THE DISSENTERS IN *LYNCH v. DONNELLY* SUPPORTS THE CONSTITUTIONALITY OF PITTSBURGH'S DISPLAY OF THE MENORAH.

If this Court follows the decision in *Lynch v. Donnelly*, the constitutionality of the menorah must be upheld. Our argument goes beyond *Lynch v. Donnelly*, however. We submit that Pittsburgh's display of the menorah is constitutional even under the views expressed by the dissenters in *Lynch*.

A. The Display Satisfies the Criteria of Constitutionality Enumerated in the *Lynch* Dissent.

The dissenters in *Lynch* took a different view of the three "prongs" of the *Lemon v. Kurtzman* test, and they would have found the nativity scene in that case unconstitutional under all three criteria. But if the dissent's reasoning is applied to the record facts in this case, a different conclusion emerges. By the standards of the *Lynch* dissent, Pittsburgh's menorah passes constitutional muster.

1. *Pittsburgh implements a secular purpose in a display that is not religiously exclusive.*—Justice Brennan's dissent in *Lynch* noted that there was no "contemporaneous expression" of a "clear secular purpose" for the display at issue in that case. 465 U.S. at 698. In the present case, the "Salute to Liberty" sign is such a "contemporaneous expression," and it plainly manifests the secular purpose that Pittsburgh has been trying to achieve. The "festive lights" of Christian and Jewish holidays signify the "flame of liberty" that is part of the country's "legacy of freedom"—and particularly religious freedom. That is plainly a proper secular purpose.[9]

[9] Since the theme centers on "lights"—which are represented by the bulbs on the Christmas tree and the lamps or candles of the menorah—the same message could not be conveyed "by other means"—as the dissent in *Lynch* thought possible in that case. 465 U.S. at 699.

Moreover, Pittsburgh's display does not manifest "sectarian exclusivity," as did the display in *Lynch*. 465 U.S. at 700. The dissent in *Lynch* condemned the "sectarian purpose" that, in its view, prompted the inclusion of a "distinctively religious element" in an allegedly secular display. *Id.* By contrast, the addition of a menorah to the Christmas tree display that has traditionally stood at Pittsburgh's City-County Building made the display non-exclusive. Rather than evincing the narrow sectarian motive that the *Lynch* dissenters discerned in the challenged nativity scene, the menorah in Pittsburgh's display manifests government's openness and receptivity to the views of adherents of *all* faiths.

2. *Since inclusion of the menorah broadens Pittsburgh's holiday display, its "primary effect" does not advance religion.*—The dissent in *Lynch* viewed the creche as a form of "religious chauvinism" because it "singled out Christianity for special treatment." 465 U.S. at 701-02. On this account, the dissenters concluded that the creche's "primary effect" was "to place the government's imprimatur of approval on the particular religious beliefs exemplified by the creche." 465 U.S. at 701. In the present case, there is no "particular" religious belief that government appears to endorse when it places a menorah immediately adjacent to a Christmas tree. Instead, the message of the joint display is the message of "equal access" to "a broad spectrum of groups" that the *Lynch* dissenters believed to be constitutionally desirable. 465 U.S. at 702.

Terms like "advocacy," "alignment," "endorsement," and "imprimatur of approval"—all of which were used in the *Lynch* opinions—are appropriate when a single faith is selected for favored governmental treatment. In *Lynch*, the central issue was whether Christianity was impermissibly endorsed by a government-sanctioned display that gave no recognition to any other faith. The creche, in the view of the dissenters, "convey[ed] the message" that the views of minority religious groups "are not similarly worthy of public recognition nor entitled to public support." 465 U.S. at 701 (footnote omitted).

These considerations are absent when the issue is whether a Jewish symbol may be *added* to an otherwise unchallenged Christian display. In view of the towering presence of the Christmas tree beside the menorah, it is clear that Judaism is neither advocated nor endorsed by the City of Pittsburgh. Nor does the City "align itself" with Judaism or give it a governmental "imprimatur of approval" if it places an 18-foot-high menorah next to a 45-foot-high Christmas tree. No one can maintain, in these circumstances, that Judaism is granted "special treatment" or is the beneficiary of "religious chauvinism."

In contesting the majority's conclusions regarding the effect of the creche, the *Lynch* dissenters found it significant that Pawtucket had

> done nothing to disclaim government approval of the religious significance of the creche, to suggest that the creche represents only one religious symbol among many others that might be included in a seasonal display truly aimed at providing a wide catalog of ethnic and religious celebrations, or to disassociate itself from the religious content of the creche.

465 U.S. at 706. Here, all of these concerns are met. The sign in front of the display explains its secular purpose. The inclusion of a non-devotional symbol of another religion implicitly disassociates the city from the religious content of either symbol.

The dissenters noted that in *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963), the Court had

stated that classroom Bible reading would be permissible if presented objectively as part of a secular education program. 465 U.S. at 706-07. Similarly, the *Lynch* dissenters concluded that a creche could play a secular role if it were in a museum setting, "in the company of other religiously inspired artifacts," because there would be "objective guarantees that the creche could not suggest that a particular faith had been singled out." 465 U.S. at 713. The inclusion of the menorah alongside the Christmas tree makes the Pittsburgh display the type of government acknowledgment of religion (without endorsement) that the *Lynch* dissenters cited as unobjectionable under the Establishment Clause.

3. *Pittsburgh's display creates no excessive administrative entanglements with religion.*—The *Lynch* dissent acknowledged that since the nativity scene had been erected without extensive consultation with religious officials, there was no administrative entanglement between religion and government. The dissenters were concerned that other religious groups would press for inclusion of their symbols, and accommodations to various demands would have to be made. 465 U.S. at 702.

Pittsburgh has, however, demonstrated its readiness to permit the symbols of non-Christian faiths to be displayed. A policy of open and equal access reduces, rather than aggravates, the constitutional difficulties. *See, e.g., Widmar v. Vincent*, 454 U.S. 263 (1981). Hence the prospect of future impermissible entanglement is less here than it was in *Lynch*.

B. The Menorah Is Not a Sacred Object and Its Display Does Not Involve Pittsburgh in Religious Observance.

The dissent in *Lynch* emphasized the holy character of the nativity scene at issue in the case (465 U.S. at 708-09), and the separately stated views of Justices Blackmun and Stevens decried the "misuse of a sacred symbol"

(465 U.S. at 727). The record in this case establishes that the menorah is not in the same category of devotional or sacred objects. It symbolizes not only a particular religious observance unique to Judaism, but also cultural and national aspirations, as well as universal human values.

Expert testimony in the district court established, to the satisfaction of the trial judge, that the Chanukah menorah "has no particular religious significance when placed in a public location beyond signifying a 'Light to the World' somewhat like the Christmas message 'Peace on Earth, Goodwill to Men'" (Pet. App. III, 39a). The district judge had ample basis in the testimony to arrive at this conclusion. Although the plaintiffs' expert witness, a rabbi of a Reform congregation, testified initially that a menorah is a "religious symbol" (J.A. 140; *see also* J.A. 24-25), he acknowledged on cross-examination that it is also viewed as a "cultural symbol" (J.A. 143, 145). Chabad's expert witnesses, who are Orthodox rabbis, said it was "incorrect" to characterize a menorah as a "purely religious symbol." Rabbi Yisroel Rosenfeld attested in an affidavit (J.A. 41-46) and in oral testimony (J.A. 225-306) that the menorah is not "an inherently religious object" (J.A. 237), that it carries historical and cultural messages of ethnic pride (J.A. 229-30), that it conveys universal messages of freedom of conscience and good will to all people (J.A. 230, 245, 302-04; Pet. App. III, 39a), and that it is also used as a political symbol, such as the symbol of the State of Israel (J.A. 240). A non-Hasidic Orthodox rabbi, not affiliated with Chabad, testified that the menorah itself has no religious significance whatever, and that the lighting of Chanukah candles satisfies the religious obligation even if no candelabrum is used (J.A. 309-10).

The same rabbi testified that the menorah is a symbol of the Jewish *people*, and not merely of the Jewish *religion* (J.A. 310). It is a display, therefore, of ethnicity, similar to a St. Patrick's Day parade (J.A. 229, 237).

The expert testimony established beyond any doubt that there is a critical difference, under Jewish religious doctrine, between a menorah used in the home—where there is a religious duty to light Chanukah candles—and the menorah in a public place—which is only a symbolic representation of Jewish cultural and religious values (J.A. 230-32). The district judge appreciated the thrust of this proof when he observed, during the testimony of Rabbi Rosenfeld (J.A. 234):

> He says, as I understand him, that it's not a obligation in the religious sense to light a menorah in a public place. Therefore, you're laying the ground work for an argument that this display of the menorah on the steps of the City-County Building was not necessarily a religious display, therefore, did not necessarily have any religious significance.

In short, this is not a case in which the city is maintaining an object that is worshipped by the faithful or that is an intrinsic part of an actual religious service. If a government agency erected an altar or a Holy Ark around which the members of a faith could conduct required religious services, the constitutional issue would be a different one. In this case, the findings of the district court established that the publicly displayed menorah, separated from the ritual of lighting in the home, conveys universal, historical, political and cultural messages, and not primarily religious ones (J.A. 230-33, 234, 236-37; Pet. App. III, 39a). Such a symbol—particularly when included in an ecumenical and eclectic seasonal display—presents no threat to the values protected by the Establishment Clause.

C. The Display Promotes First Amendment Values By Granting a Minority Faith Access to Public Property.

The *Lynch* dissent discussed, in great detail, the conflicting religious attitudes towards Christmas shown throughout American history (465 U.S. at 718-24), and

it emphasized the importance of preserving the rights of religious minorities (465 U.S. at 708-09). The dissenting opinion emphasized the constitutional values that protect "our remarkable and precious religious diversity." 465 U.S. at 697. The values of religious diversity are affirmatively served by a display that, like Pittsburgh's, includes a Chanukah menorah along with a Christmas tree.

The presence of the menorah beside the larger Christmas tree symbolizes the "remarkable and precious religious diversity" which makes Americans proud. Rather than amounting to "governmental favoritism toward one set of religious beliefs" (465 U.S. at 714), the placement of a menorah adjacent to a Christmas tree recognizes "the religious beliefs and practices of the American people as an aspect of our national history and culture." 465 U.S. at 716. It is surely not what the dissenters in *Lynch* believed the creche to be—"a coercive, though perhaps small, step toward establishing the sectarian preferences of the majority at the expense of the minority." 465 U.S. at 725.

The reasoning of the *Lynch* dissent would, we believe, condemn the elimination of the menorah from a display in which it stands by the side of a Christmas tree. Eradicating the menorah would, in these circumstances, substitute religious chauvinism for religious toleration.

III. THE CITY OF PITTSBURGH MAY NOT CONSTITUTIONALLY EXCLUDE FROM ITS DISPLAY SYMBOLS OF RELIGIOUS MINORITIES.

This case concerns the constitutionality of Pittsburgh's *voluntary* display of a menorah. The municipality's authorized officials determined that it was appropriate to place a menorah next to the Christmas tree that had traditionally stood on the steps of the City-County Building. For reasons previously stated, we believe that this decision was constitutionally permissible.

An additional reason for sustaining the constitutionality of Pittsburgh's voluntary decision to display the menorah is that Pittsburgh truly had no choice. It could not, consistently with this Court's rulings, permit a display of a Christian symbol such as a Christmas tree and, at the same time, turn down a request that equal treatment be afforded—at no expense to the public treasury—to an equivalent, non-devotional symbol of another faith.

In *Larson v. Valente*, 456 U.S. 228 (1982), this Court held that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." 456 U.S. at 244. The First Amendment requires "that every denomination . . . be equally at liberty to exercise and propagate its beliefs." 456 U.S. at 245. The constitutional prohibition against denominational preferences is essential not only to secure the rights guaranteed by the Establishment Clause, but also to preserve the liberties secured to minority faiths by the Free Exercise Clause.

The *Lynch* Court acknowledged that "we require strict scrutiny of a . . . practice patently discriminatory on its face," but saw nothing "explicitly discriminatory in the sense contemplated in *Larson*" in the Pawtucket display. 465 U.S. at 687, n.13. Here, by contrast, exclusion of the menorah from Pittsburgh's display would constitute patent discrimination against the Jewish religion. *Cf. American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1109 n.20 (11th Cir. 1983) (applying *Lemon* rather than *Larson* to erection of cross in state park because "no evidence has been presented concerning the state's refusal to approve construction of symbolic expressions of religions other than Christianity in state parklands").

Whether or not the Christmas tree has sanctity under Christian theology, there can be little doubt that it is a symbol with significance primarily for adherents to the

Christian faith. It has no roots in Jewish tradition or in the faiths of Moslems, Hindus, Buddhists, or other non-Christians. Yet the City of Pittsburgh apparently purchases and displays each year a tree that manifests this denominational preference.

The rule of *Larson v. Valente* prohibits such religious exclusivity. Any other religious group that seeks equal treatment is constitutionally entitled to obtain a comparable public spot where a similar non-devotional symbol may be displayed. That principle was articulated by Judge Arnold of the Court of Appeals for the Eighth Circuit when he dissented from a decision rejecting the constitutional right to display a menorah where a Christmas tree has been erected. *See Lubavitch of Iowa, Inc. v. Walters*, 808 F.2d 656, 657 (8th Cir. 1986):

> A Christmas tree owned by the State of Iowa has been erected in the rotunda of the state capitol. Another Christmas tree, also owned by the state, has been erected on the capitol grounds. The ornaments on the tree in the rotunda of the state capitol include angels. The state is obligated to treat all religions evenhandedly. Allowing the placement of these Christmas trees, while at the same time denying permission for the Menorah, appears to be a discrimination against the Jewish religion. So long as Chrismas symbols are permitted, other religions should be given equal treatment.
>
> I would therefore grant the relief sought by plaintiffs-appellants, leaving, however, to the state the option of removing any unattended Christmas trees from the state capitol and its grounds, in which event the state would be free not to allow any unattended Menorah on the capitol grounds.

It is no answer to argue, as the plaintiff did below, that Moslems, Unitarians, Buddhists, and atheists have no equivalent symbol in Pittsburgh's display. The fact is that none of these religious denominations and nonreligious groups have ever asked to be represented in the

display. If Pittsburgh were overwhelmed with demands for space in the display and could not find room on public property to satisfy all who made bona fide requests, the constitutional issue would be a substantially different one. But where the only request for equal treatment has come from a group whose request can easily be accommodated by the city, the Constitution prohibits discrimination as between competing faiths. The Religion Clauses require Pittsburgh to afford space for a Jewish symbol in its otherwise Christian holiday display.

We note, finally, that there is evidence in the record from which one may conclude that the steps of the City-County Building have been used in the past for public demonstrations. One witness testified that a demonstration on behalf of Soviet Jewry had been conducted at that location (J.A. 244-45). Since the primary hearing in this case was conducted before Chabad was permitted to intervene and no party during that hearing was motivated to establish that the steps of the building constituted a "public forum," there is only sketchy evidence on the subject.[10] Nonetheless, there is a substantial likelihood that the important governmental structure was the focus of public meetings, and that access to it is protected not only by the Religion Clauses of the First Amendment, but also by the constitutional protection for free expression.

In *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided court sub nom. Board of Trustees of Village of Scarsdale v. McCreary*, 471 U.S. 83 (1985), the Court of Appeals for the Second Circuit held that the First Amendment's guarantee for free expression entitles church groups to have access to a city's "public forum" so as to display a nativity scene. To deny such access would violate the principle established

[10] Indeed, as soon as Chabad's trial counsel used the term "public forum," both counsel for the plaintiff and counsel for the city objected and sought to preclude use of that phrase (J.A. 234-36).

by this Court in *Widmar v. Vincent*, 454 U.S. 263 (1981), which prohibits official discrimination against speech because of its religious content.

In this case, the City of Pittsburgh could not, we submit, deny Chabad permission to display the menorah without violating the right of free expression recognized in *McCreary v. Stone*. Since Pittsburgh voluntarily displayed the menorah at Chabad's request, the issue was never litigated. But the "public forum" consideration in this case is an additional reason to uphold the authority of the city to include the menorah in its display.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the judgment of the district court reinstated.

Respectfully submitted,

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